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Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1998 TERM

IN RE $3,166,199

Arkansas Highway Police, *Petitioner*

v.

Crittenden County Prosecuting Attorney's Office; Brent Davis, Prosecuting Attorney For The Second Judicial District; And State Of Arkansas, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a state court may exercise jurisdiction over a *res* that (a) has been seized by federal authorities pursuant to federal law; (b) is within the exclusive possession and control of federal authorities; and (c) is the subject of federal administrative forfeiture proceedings (particularly when the United States has never been served or joined in the state proceedings).

Whether the exclusive jurisdiction conferred upon the federal district courts by the Constitution and laws of the United States can be abrogated by a state statute. Is state law or federal law determinative of federal jurisdiction?

Whether a state court may reject decisions of the Circuit Court of Appeals in which the state lies regarding issues of federal law that directly relate to the operations and actions of federal agencies and officers, and directly affect federal sovereignty.

PARTIES TO THE PROCEEDINGS

Petitioner:

Arkansas Highway Police

Respondents:

Crittenden County Prosecuting Attorney's Office Brent Davis, Prosecuting Attorney for the Second Judicial District of Arkansas State of Arkansas

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS & ORDERS ENTERED IN THE CASE

In re $3,166,199, 337 Ark. 74, 987 S.W.2d 663 (March 18, 1999)

JURISDICTIONAL STATEMENT

(i) The Arkansas Supreme Court rendered the opinion for which Petitioner seeks review on March 18, 1999.

(ii) A petition for rehearing was timely filed in the Arkansas Supreme Court on April 2, 1999, but the petition for rehearing was denied on April 29, 1999.

(iii) Jurisdiction for review of the decision of the Arkansas Supreme Court is conferred on this Court by 28 U.S.C. § 1255(a).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

(See Appendix for Text)

Supremacy Clause of the United States Constitution, Art. 6, cl. 2

21 U.S.C. 873. Cooperative arrangements

21 U.S.C. § 878. Powers of enforcement personnel

21 U.S.C. § 881. Forfeitures

21 U.S.C. § 882. Injunctions

21 U.S.C. § 883. Enforcement proceedings

21 U.S.C. § 885. Burden of proof; liabilities

28 U.S.C. § 1346(f)

28 U.S.C. § 1355

28 U.S.C. § 1356

28 U.S.C. § 1402

28 U.S.C. § 1441

28 U.S.C. § 1442

Ark. Code Ann. § 5-64-501 to -509

Ark. Act 1120 of 1999 (Amending Ark. Code Ann. § 5-64-505 & Repealing Ark. Code Ann. § 5-64-509)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October 1998 Term

IN RE $3,166,199

Arkansas Highway Police, *Petitioner*

v.

Crittenden County Prosecuting Attorney's
Office; Brent Davis, Prosecuting Attorney
For The Second Judicial District; And
State Of Arkansas, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This petition is essentially an appeal from *state* proceedings purporting to forfeit $3,166,199 to the local prosecutor. The problem is that, and the federal questions arise because, the *res*: (a) was seized by Petitioner *and* the Drug Enforcement Administration ("DEA") on March 7, 1998; (b) has been in the sole custody of the United States Marshal for the Eastern District of Arkansas since March 10, 1998; (c) was and is the subject of an on-going joint multi-state investigation by Petitioner and the DEA; and, (d) was the subject of federal

administrative forfeiture proceedings, which were subsequently filed as a federal judicial forfeiture on July 27, 1998, when the United States filed a verified complaint for forfeiture in response to an administrative claim filed by Respondents in the administrative proceedings. *United States v. $3,166,184*, No. LR C 98-509 (E.D. Ark.). The District Court entered an order on March 23, 1999, dismissing the federal action, relying on the Arkansas Supreme Court's opinion in this matter. The federal action is still pending, awaiting determination of a motion to reconsider and request for stay. See 28 U.S.C. § 1355(c), which preserves federal jurisdiction and requires the district court to enter orders necessary to preserve the *res* pending appeal. Petitioner anticipates an appeal in the federal proceedings. In another related case, the individual from whom the *res* was seized pled guilty on May 4, 1999, to federal money-laundering and conspiracy charges in the Southern District of Texas. *United States v. Roberto V. Zamarripa*, No. CR 99-113 (S.D. Tex.).

The posture of these state proceedings has been exceedingly complex because, over Petitioner's objections, these proceedings have been conducted in the absence of the *res*, in the absence of service on the United States, and in the absence of service on Petitioner. To date, neither Petitioner nor the United States have received a copy of the complaint from Respondents, much less a summons. On Saturday, March 7, 1998, at about 8:15 p.m., Petitioner discovered $3,166,199 in the cab of a truck at one of its weigh stations on Interstate 40, in Crittenden County, Arkansas. The weigh station is located across the Mississippi River and about 10 miles from Memphis, Tennessee. The truck was engaged in interstate commerce and neither its origin nor destination were in Arkansas. Upon securing the area and the *res*, Petitioner immediately contacted the DEA, which opened a federal investigation and either jointly seized or adopted the seizure of the *res* between 8:15 p.m. and

10:00 p.m. on March 7, 1998.[1] The *res* was transported to Petitioner's headquarters in Little Rock, Arkansas on Monday, March 9, 1998, and the DEA took sole possession and custody of the *res* on March 10, 1998. No complaint had been filed in the state court at the time, and Petitioner and Respondents dispute whether the senior deputy prosecuting attorney, James C. Hale, Jr. ("Hale, Jr.") expressly agreed to the federal seizure on multiple occasions between March 7 and March 9, 1998. On March 18, 1998, at the instance of Hale, Jr., the Crittenden County Prosecuting Attorney's Office ("CCPAO"), through its private contract attorney, Hale, Jr.'s son, James C. Hale, III, obtained an *ex parte* order from the Crittenden County Circuit Court directing Petitioner to deposit the *res* into a bank and wire the money to the CCPAO. App. at A10-A11. No complaint had been filed, and no written pleading, motion, or affidavit was submitted to the trial court. After receiving a faxed copy of the *ex parte* order, Petitioner moved to quash the order arguing the impropriety of the *ex parte* nature of the proceedings, the absence of any pending cause of action, the lack of state court jurisdiction over the federally seized *res*, and the failure to serve the United States, which seized, possessed, and was claiming, the *res*, as well as various state law issues. App. at A90-A95.

On March 20, 1998, after the federal seizure, the CCPAO filed a complaint for forfeiture of the *res* in state court. App. at A288-A290. Petitioner moved to dismiss, again raising the issues of exclusive federal jurisdiction and absence of service

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[1] Petitioner has simply referred to the federal seizure as an adoption in these proceedings. In pending proceedings before the District Court for the Eastern District of Arkansas, the United States has taken the position that there was a joint federal and state seizure of the *res*. Given the cooperation and sharing of information between Petitioner and the DEA on the evening of March 7, 1998, either characterization is correct. For purposes of these proceedings, in which the United States was never served, any difference between seizure by adoption or joint seizure is merely semantic. Whether a joint seizure with Petitioner or by adoption, a federal seizure occurred on March 7, 1998.

on Petitioner and the United States. App. at A96-A110, A147. At a hearing on April 1, 1998, Petitioner advised the trial court that the *res* had been seized by the DEA and was the subject of federal administrative proceedings, that the court lacked jurisdiction because federal jurisdiction was exclusive, and that if the CCPAO thought differently it should serve the DEA and Petitioner with process. The CCPAO argued that neither Petitioner nor the DEA were entitled to any notice, that the CCPAO was the seizing agency, and that only the CCPAO had authority to "transfer" the *res* to federal authorities because "[t]he seizing agency has authority to say where the money goes." App. at A276 (emphasis added). At the end of the hearing, the trial court reserved its ruling but stated that the DEA should be served since it had the *res*. App. A281-A282.

Nevertheless, and even though the DEA was never served, the trial court subsequently, without notice to either Petitioner or the DEA, and prior to ruling on Petitioner's motion, entered agreed orders of forfeiture (forfeiting the *res* to the CCPAO even though the action was brought in the name of the State of Arkansas) on April 20 and 24, 1998. App. at A11-A17. On May 8, 1998, the trial court denied Petitioner's motion to dismiss, ruling that: Petitioner was a party and bound by the court's orders but had no standing; the CCPAO was the "seizing agency;" Petitioner lacked authority to "transfer" the *res*; the state court possessed jurisdiction; and state law required a turnover order before federal authorities could seize the *res*; but also ruling that Petitioner could not comply with the *ex parte* order. App. at A18-A19. Petitioner filed a motion to reconsider, again arguing that the federal action was not dependent upon state law, App. at A166-A167, that the court's ruling conflicted with federal law, and that "[f]ederal law is the supreme law of the land, not the other way around." App. at A147. The motion to reconsider was deemed denied on June 18, 1998, pursuant to Rule 4(b)(1) of the Arkansas Rules of Appellate Procedure - Civil (formerly Rule 4(c)). The trial court

subsequently entered a judgment on July 16, 1998, in which, assuming the court possessed jurisdiction to enter the judgment, the court changed its mind on one issue, concluding that Petitioner was now *not* a party but still bound by the court's rulings. App. at A20-A24.

On appeal, Petitioner again raised the lack of state court jurisdiction over a *res* in federal custody and subject to federal forfeiture proceedings, App. at A184-A187, A189, A190-A191, A203-A205, A230-A231, A235-A241, A242-A243, the failure to serve either the federal government or Petitioner, id. at A188-A189, A232-A233, A241-A242, and other state law issues. Respondents, contrary to their argument in the trial court, argued that a turnover order from the state court was required, regardless of any dispute between Petitioner and the CCPAO over which state agency was the "seizing agency" under the state law. Petitioner argued that Respondents were barred from making the argument under the doctrine of judicial estoppel and that state law contained no such turnover order requirement, but even if it did, such a construction would conflict with federal law, which is the supreme law of the land.

Despite the arguments and the continuing absence of the *res*, the Arkansas Supreme Court affirmed the trial court's "attempted exercise of jurisdiction," although it also held that Petitioner possessed standing to appeal as a *non-party* and reversed the trial court by ruling that Petitioner was the seizing agency under state law. App. at A1-A9. In affirming the "attempted exercise of jurisdiction," the court relied entirely on a statutory construction analysis of Ark. Code Ann. § 5-64-505 and concluded that the *res* could not be "transferred" to federal authorities without a state court order. App. at A6-A9. The court concluded that state law controlled the jurisdictional dispute and that its statutory construction analysis resolved the matter, rejecting Petitioner's federal law arguments. App. at A9. On April 29, 1999, the court denied, without opinion,

Petitioner's petition for rehearing, in which Petitioner requested the court address: (a) the conflict between the federal law, as cited and argued by Petitioner, and the court's construction of Ark. Code Ann. § 5-64-505[2]; (b) the failure to name or serve Petitioner and the DEA; (c) and several state constitutional arguments that the court failed to address. App. at A247-A258; App. at A25.

Even though the federal issues were argued in the trial court and on appeal, the issues are jurisdictional and "may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below." *Matson Navigation Co. v. United States*, 284 U.S. 352, 359 (1932). The authority of Arkansas law and the jurisdiction of its courts to preempt or interfere with a federal seizure and forfeiture has been the core issue at the trial court and on appeal. Even if it were somehow determined that state courts possess jurisdiction to do such a thing, the secondary federal issue of whether the state courts' actions are of any effect in the absence of service on federal authorities must also be addressed.

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[2] While this matter was on appeal, Ark. Code Ann. § 5-64-505 was substantially amended by Ark. Act 1120 of 1999. Section 2 of the Act amends Ark. Code Ann. § 5-64-505(g) to clarify that forfeiture proceedings are commenced by "filing a complaint with the circuit clerk of the county in which the property was seized and by serving such complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure." Amended paragraph (d) purports to prohibit transfers of property from state to federal authorities, but the Act appears to fall into the same trap as the Arkansas Supreme Court of ignoring the fact that what it purports to prohibit is, in fact, a federal seizure, a federal action not dependent upon state law. Accordingly, the amendments do not eliminate the jurisdictional conflict, although they make the unconstitutionality of the statute crystal clear. To the extent that the statute, whether as interpreted by the Arkansas Supreme Court or as amended, purports to interfere with federal actions authorized by federal law, the statute is clearly unconstitutional.

REASONS FOR WRIT

This Petition for Writ of Certiorari should be granted pursuant to paragraphs (b) & (c) of Rule 10 of the Rules of the Supreme Court. Petitioner respectfully submits that the Arkansas Supreme Court has ruled that state law effectively trumps federal law, standing the Supremacy Clause on its head and deciding the issue in a way that conflicts with the decisions of the Maryland Court of Appeals in *Cavaliere v. Town of North Beach*, 646 A.2d 1058 (Md. 1994); the Fourth Circuit Court of Appeals in *United States v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267, 272 (4th Cir. 1990); and the Eighth Circuit Court Appeals in *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995). The Arkansas court's opinion in this matter, as well as the Fifth and Seventh Circuit decisions discussed *infra*, also conflicts with this Court's decision in *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); even though the opinion claims to rely upon it.

The Arkansas Supreme Court appears to be the first state court in the modern era to attempt to directly invalidate a federal seizure and forfeiture action by making state law controlling on federal officials acting pursuant to federal law.[3] The court determined that because a state seizure had occurred, no federal seizure occurred, a conclusion the court lacked jurisdiction to reach pursuant to 28 U.S.C. § 1355 and belied by the absence

[3] The Alaska Supreme Court certainly expressed its disapproval of the federal law and "transfers" to federal agencies by affirming a judgment for conversion under state law against a city police department in *Johnson v. Johnson*, 849 P.2d 1361 (Ak. 1993); but the Ninth Circuit apparently disagreed with the Alaska court's assessment of the propriety of the use of federal law, tacitly approving federal and state/local cooperation, by affirming the DEA's seizure, forfeiture, and equitable sharing of the proceeds of, the check issued to satisfy the *Johnson* judgment. *United States v. Check No. 25128*, 122 F.3d 1263 (9th Cir. 1997). Furthermore, even the Alaska court did not venture to attempt to adjudicate title to the *res* after it had been seized by federal authorities.

of the *res*. The Arkansas court construed Ark. Code Ann. § 5-64-505 to automatically vest jurisdiction (apparently exclusive) in the state courts any time a state officials are in any way involved in a seizure, and completely guts the federal forfeiture laws and federal laws related to jurisdiction over federal actions. The ruling makes federal seizures and jurisdiction subject to the whims of state and local entities. In ruling that Ark. Code Ann. § 5-64-505 automatically vests state courts with jurisdiction, thus presumably preventing any federal action without leave of the local trial court, the court's holding specifically conflicts with this Court's decision in *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 197 (1935) ("[t]he jurisdiction conferred on the district courts by the Constitution and laws of the United States *cannot be affected by state legislation*") (emphasis added); 21 U.S.C. § 881; and 28 U.S.C. §§ 1355 & 1356. The Arkansas court's ruling allows state courts to determine federal jurisdiction and the propriety of federal acts even in the absence of service upon federal authorities, and is contrary to specific federal statutes. 28 U.S.C. §§ 1355 & 1356. Such a result also eviscerates the federal removal statutes regarding federal officers and property in which the federal government claims and interest.

CONFLICT BETWEEN THE STATE COURTS

The Arkansas court's opinion clearly conflicts with the opinion of the Maryland Court of Appeals in *Cavaliere v. Town of North Beach*, 646 A.2d 1058 (Md. 1994) (there is "dual sovereignty" and there is "nothing improper, much less unlawful, about the cooperative arrangements between Federal, State, and local authorities, including the procedure for utilizing the Federal forfeiture process in lieu of the State process"); and implicitly conflicts with *King v. State*, 443 S.E.2d 844 (Ga. 1994) (affirming that state court had no jurisdiction after *res* was in federal custody even though seizure took place during state court proceedings). Instead of recognizing the dual sovereignty, the

Arkansas court's opinion allows state law to occupy the entire field of asset forfeitures, to the exclusion of federal law, even where, as here, there are strong federal interests in the multi-state nature of the investigation and maintaining federal sovereignty to enforce and execute federal law. Although federal law clearly did not intend to preempt state forfeiture laws, neither did it intend to permit states to completely drive federal agencies from the field.

CONFLICT BETWEEN THE CIRCUITS, AND ARKANSAS COURT'S CONFLICT WITH EIGHTH AND FOURTH CIRCUITS

There is also conflict among the federal circuits. Even though Arkansas is part of the Eighth Circuit, the court refused to follow what appears to be the holding in *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995), that "the United States 'may adopt a seizure where there was no authority to transfer the property.'" Id., *quoting*, *Winston-Salem/Forsyth County*, 902 F.2d 267, 272 (4th Cir. 1990). See also, *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990 (6th Cir. 1993); *United States v. $12,390*, 956 F.2d 801 (8th Cir. 1992). The Arkansas court relied upon and followed the Fifth Circuit case of *Scarabin v. Drug Enforcement Administration*, 966 F.2d 989 (5th Cir. 1992); and the Seventh Circuit case of *One 1979 Chevrolet C-20 Van*, 924 F.2d 120 (7th Cir. 1991). Both *Scarabin* and *One 1979 Chevrolet*, which Petitioner submits conflict with the Fourth and Eighth Circuit rulings, held that state law automatically established exclusive state jurisdiction over the *res*, and that any "transfer" to federal authorities without a turnover order was invalid to establish federal jurisdiction. Petitioner respectfully submits that the Fifth and Seventh Circuit decisions also conflict with *Penn General* and are simply wrong in light of the plain and express language of 28 U.S.C. §§ 1355 & 1356, the Supremacy Clause, the scheme and history surrounding federal removal and jurisdictional statutes

concerning customs (and seizure) laws, and the problems created in the day-to-day application of the rules to federal and state law enforcement agencies (who are supposed to cooperate, 21 U.S.C. § 873, and must make instant *executive* decisions regarding the best course of action to take during an investigation).

Both *Madewell* and *Winston-Salem/Forsyth County*, rely on the exclusive federal jurisdiction established by 28 U.S.C. § 1355 and are consistent with the ruling in *Penn General*. Although some language in *Madewell* indicates that a federal seizure after institution of state proceedings might be impermissible, the Fourth Circuit's language is very clear and in conflict with the Arkansas Court, and the Fifth and Seventh Circuits. State law cannot preempt federal law. The Fourth Circuit's strong language is also much more consistent than the Fifth and Seventh Circuits' with 21 U.S.C. § 881, 28 U.S.C. §§ 1355 & 1366, the Supremacy Clause, the federal structure of the constitution, and the history surrounding customs and tariff laws (including seizure and forfeiture laws) and federal removal statutes. In addition to conflicting with the Fourth and Eighth Circuits, Petitioner submits that the Arkansas court's decision also conflicts with the Sixth Circuit decision in *566 Hendrickson Boulevard* in which the Sixth Circuit held that it was only the filing of a complaint in state court that commenced state judicial in rem proceedings.

ARKANSAS COURT'S CONFLICT WITH UNITED STATES SUPREME COURT

As already noted, the Arkansas court's opinion conflicts with *Penn General* by making state law determinative of federal jurisdiction. The conflict is even more glaring when it is considered that the federal jurisdiction, here, is *exclusive and mandated by statute*, not simply based on diversity jurisdiction and first in time as it was in *Penn General*. "The jurisdiction

conferred on the district courts by the Constitution and laws of the United States *cannot be affected by state legislation.*" *Penn General*, 294 U.S. at 197 (emphasis added).

ARKANSAS COURT'S LACK OF JURISDICTION & CONFLICT WITH ADDITIONAL FEDERAL LAW

28 U.S.C. §§ 1355 & 1356 clearly confer *exclusive* jurisdiction on the federal courts, and are the basis for the decisions in *Madewell*, *Winston-Salem*, and *$12,390*, and the nearly 200 years of caselaw cited therein. *E.g.*, App. at A265-A270. Perhaps the caselaw is 200 years old because the statutes are over 200 years old. The federal seizure and jurisdiction statutes have an even longer history than the federal removal statutes. 28 U.S.C. §§ 1355 & 1356 are an even less subtle effort to protect federal officials' and agencies' ability to execute the laws of the United States, and state officials and courts have *never* had authority to interfere with or second-guess federal officers making a seizure under federal law. The Founding Fathers enacted the predecessors to 28 U.S.C. §§ 1355 & 1356 in the First Congress. 24 Sept. 1789, ch. 20, § 9, v. 1, p. 76. "[T]he district courts ... shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." Id. Like the removal statutes, their purpose is to ensure consistency in interpreting federal law, permit the execution of federal law, and protect federal officers and others from "interference from hostile state courts." The discussion of the history of the federal officer removal statutes at issue in *Willingham v. Morgan*, 395 U.S. 402 (1969) is applicable here. Quoting from *Willingham* (including citations):

> The federal officer removal statute has had a long history. See H. M. Hart & H. Wechsler, The Federal Courts and the Federal

System 1147-1150 (1953). The first such removal provision was included in an 1815 customs statute. Act of February 4, 1815, § 8, 3 Stat. 198. It was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular. It allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done "under color" of the statute. Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts. This provision was not, however, permanent; it was by its terms to expire at the end of the war. But other periods of national stress spawned similar enactments. South Carolina's threats of nullification in 1833 led to the passage of the so-called Force Bill, which allowed removal of all suits or prosecutions for acts done under the customs laws. Act of March 2, 1833, § 3, 4 Stat. 633. A new group of removal statutes came with the Civil War, and they were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws. Rev. Stat. § 643 (1874); Judicial Code of 1911, § 33, 36 Stat. 1097. Finally, Congress extended the statute to cover all federal officers when it passed the current provision as part of the Judicial Code of 1948. See H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947).

The purpose of all these enactments is not hard to discern. As this Court said nearly 90 years ago in

Tennessee v. Davis, 100 U.S. 257, 263 (1880), the Federal Government

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, - if their protection must be left to the action of the State court, - the operations of the general government may at any time be arrested at the will of one of its members.

.... Federal jurisdiction rests on a "federal interest in the matter," *Poss v. Lieberman*, 299 F.2d 358, 359 (C. A. 2d Cir.), *cert. denied*, 370 U.S. 944 (1962), the very basic interest in the enforcement of federal law through federal officials. *Willingham*, at 405-406. Given the multi-state nature of the apparent crime, its minimal connection with Arkansas, the presence of counterfeit bills in the *res*, and the fact that money-laundering is traditionally more a matter of federal than state interest, there is a federal interest in this matter.

President Jackson, while dealing with the Nullification Crisis, in addition to sending troops, threatening to send more troops, and contemplating arresting and hanging the proponents of nullification, said bluntly:

> I consider, then, the power to annul a law of the United States, assumed by one State, *incompatible with the existence of the Union, contradicted expressly by the letter of the*

> *Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed.*

Andrew Jackson, Presidential Proclamation (Dec. 10, 1832) (emphasis in original), *in* Compilation of the Messages and Papers of the Presidents, II, 1203-1204, (J. D. Richardson, ed., Washington, D.C., 1908); quoted in Robert V. Remini, Andrew Jackson, Vol. III, The Course of American Democracy 20 (1984). The nullificationists were, like Respondents, using state courts and process to thwart federal enforcement of customs and tariff laws, which included federal seizures of contraband.

28 U.S.C. §§ 1355 & 1356 and their predecessors have also been part of the above-referenced judicial codes and, like the federal removal statutes, prohibit interference of "hostile state courts" by placing any review of federal seizures *exclusively* within the jurisdiction of the federal courts, and *expressly excluding* state courts from making those determinations. If there ever were any question, the Civil War settled it.

As a general proposition, some means of judicial review to make sure that a federal interest is implicated in a federal seizure is not necessarily a bad idea (although judicial review of an executive branch decision is necessarily limited), but *federal* courts, not state courts, are the only ones with jurisdiction to make that determination. 28 U.S.C. §§ 1355 & 1356 are even stronger than the removal statutes and preclude state jurisdiction altogether. Again, neither Petitioner nor the United States have ever even been served with process in the state proceedings. What occurred in the state proceedings is exactly what is supposed to be prohibited by 28 U.S.C. §§ 1355 & 1356 and the removal statutes. No state, whether by its legislature, its executive agencies, or its judiciary, can preempt or nullify a

federal law of which it disapproves, including those laws and federal case law regarding federal jurisdiction. Respondents are attempting to do so here, and with all due respect, so are the Arkansas courts.

Even if the federal decision and act of seizing the *res* is mischaracterized as merely a "transfer" from Petitioner to the DEA, and even if Petitioner lacked authority to "transfer" the *res* under Arkansas law, the federal seizure is still valid under *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995); and *United States v. Winston-Salem/Forsyth County Board of Education*, 902 F.2d 267 (4th Cir. 1990).

The weakness and internal inconsistency of the Fifth and Seventh Circuit's (and now Arkansas') holdings is also demonstrated by the seemingly contradictory opinion rendered by the Seventh Circuit in *Linarez v. United States Dep't of Justice*, 2 F.3d 208, 214 (7th Cir. 1993). Although the Seventh Circuit, like the Fifth, has stated that the failure to obtain a turnover order from the state court is a *jurisdictional* issue and has purported to follow the holding in several cases, the Seventh Circuit, nevertheless, affirmed a federal forfeiture in the absence of a state turnover order where Linarez failed to raise the issue until his reply brief on appeal. If the issue were truly one of jurisdiction, it should have been permissible to raise the issue at any point, even during reply on appeal or *sua sponte* by the court.

The rulings of the Arkansas court, and the Fifth and Seventh Circuits create a great problem for law enforcement agencies in their daily activities. For example, suppose state and federal authorities find a large amount of drugs or currency being transported from one state to another. Suppose that counterfeit bills are found among the currency. Suppose also that the seizure is made in a third state somewhere between the other two, that all of the participants in the transaction are located in the other states, and there is a need to quickly commence a

multi-state investigation to identify and locate those participants. Apparently, federal use of the shipment, vehicle, currency, or anything else seized would be prohibited without a state court order under the Arkansas ruling. Apparently, a state court (Respondents' position has been that even the local prosecutor) can nix a multi-state federal investigation and prosecution. Although not usually of the size present here, such discoveries occur on a daily basis, and decision must be made immediately and in confidence by state and federal law enforcement agencies. Is an order from the state court required before the *res* can be used by federal agents in any manner? Under the Arkansas court's reasoning, the answer seems to be yes and involve the state courts and local prosecutors in the oversight of *federal* decisions, investigations, and prosecutions.

ARKANSAS COURT'S LACK JURISDICTION BECAUSE OF ABSENCE OF SERVICE UPON DEA AND PETITIONER

The errors of the Arkansas court, here, are even clearer when considered in light of the failure to require service of process upon the DEA. The result is that traditional notions of service and pleading on a party seeking a judgment, not to mention the numerous federal statutes regarding service of process upon federal agencies, have been completely ignored by the state courts. *E.g. Chase Nat. Bank v. Norwalk*, 291 U.S. 431 (1934); *Martin v. Wilks*, 490 U.S. 755 (1989) ("a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"). At least as importantly, Petitioner and the DEA have been effectively denied the opportunity to even remove the case by Respondents' deliberate refusal to even serve them with process. See, *Murphy Brothers, Inc. v. Mechetti Pipe Stringing, Inc.*, No. 97-1909, ___ U.S. ___ (April 5, 1999). The reasonableness of the DEA's fear of being construed as having submitted to the state court's jurisdiction and resulting reluctance to intervene is self-evident, given the nature of the proceedings. The failure of the trial

court to promptly dismiss Petitioner from the proceedings and its subsequent self-contradictory efforts to prohibit Petitioner from making arguments, while at the same time purporting to make its rulings binding on Petitioner, required Petitioner to pursue an appeal even though it has never been served and has not been made a party.

ERROR IN FAILING TO FOLLOW EIGHTH CIRCUIT PRECEDENT

Petitioner acknowledges the general rule that decisions of the Circuit Courts of Appeals are not binding on state courts, even with regard to issues of federal law, but Petitioner submits that an exception to the rule should be recognized where, as here, the state court ruling purports to determine the day-to-day operations of a federal agency and impinge on federal sovereignty. The Arkansas Court expressly refused to follow *Madewell*, and has placed state and federal officials in a quandary. Should they follow what the Eighth Circuit says is federal law, or should they follow what the Arkansas Supreme Court says is federal law? Under these circumstances, Petitioner submits that the Court should create an exception to the general rule and rule that the Arkansas Court erred in failing to treat *Madewell* as controlling authority.

CONCLUSION

Regardless of the doctrine of *stare decisis*, *Madewell* and *Winston-Salem/Forsyth County*, should have been followed because they are correct. See, the cases cited therein and 28 U.S.C. §§ 1355 & 1356. Under federal law, federal courts have exclusive original jurisdiction over federal seizures. State courts are not free to disregard federal law. "The Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Testa v. Katt*, 330 U.S. 386 (1947), *quoting*,

Claflin v. Houseman, 93 U.S. 130 (1876). Like the filing of a notice of removal, the seizure of the *res* by a federal agency deprives the state courts of jurisdiction even if it is properly established. If the seizure is improper, like the removal situation, the federal court is the forum in which to address the issue, not a state court where the federal agency and others are deliberately deprived of appropriate notice.

Petitioner respectfully submits that trying to square the Arkansas court's opinion, as well as those of the Fifth and Seventh Circuits, with federal law is akin to decreeing that the sun to bow or that two and two make six. It simply does not fit with history, with practice, with the Supremacy Clause, with the plain language of 28 U.S.C. §§ 1355 & 1356, with federal case law surrounding federal seizures, or with fundamental notions of justice. Petitioner has been placed in the position of attempting to serve two masters, and Respondents' arguments are better addressed to the United States Congress instead of the state courts of Arkansas. Petitioner prays that the Court issue a Writ of Certiorari to the Arkansas Supreme Court pursuant to Rule 10(b) & (c), and reverse and vacate of the state court orders regarding the *res*.

RESPECTFULLY
SUBMITTED,

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(2)

Supreme Court, U.S.
FILED

No. _____ 99 1 81 JUL 27 1999

OFF

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1998 TERM

IN RE $3,166,199

Arkansas Highway Police, *Petitioner*

v.

Crittenden County Prosecuting Attorney's Office; Brent Davis, Prosecuting Attorney For The Second Judicial District; And State Of Arkansas, *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

APPENDIX

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I. OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

IN the MATTER of $3,166,199

Arkansas Highway Police
v.
Crittenden County Prosecuting Attorney's Office; Brent Davis, Prosecuting Attorney for the Second Judicial District; and State of Arkansas, Nominal Plaintiff Below

98-957

___ S.W.2d ___

Supreme Court of Arkansas
Opinion delivered March 18, 1999

LAVENSKI R. SMITH, Justice.

This is an appeal from the Circuit Court of Crittenden County and involves the seizure and forfeiture of over $3.1 million found in the course of a random search of a tractor-trailer truck on an Arkansas highway. The litigation is a dispute between state and local authorities over the proper jurisdiction for forfeiture proceedings. The case requires a first-impression interpretation of Ark. Code Ann. § 5-64-505 (Repl. 1997). We affirm in part and reverse in part.

At approximately 8 p.m. on March 7, 1998, Roberto V. Zamarripa, a truck driver, stopped at the Lehi Weigh Station on Interstate 40 in Crittenden County for a routine check by the Arkansas Highway Police ("AHP"). Upon entering the cab and sleeper section of the truck, Officer J.R. Smith ("Smith"), the searching officer, discovered alcohol, multiple log books with entry violations, and several suitcases. When Officer Smith

opened the suitcases, he discovered the currency, later determined to be in the amount of $3,166,199. AHP immediately notified its headquarters, which contacted Ray Davis ("Davis"), the liaison officer for the Little Rock office of the Drug Enforcement Agency ("DEA"). Davis "adopted" the seizure pursuant to federal forfeiture law sometime between 8:30 p.m. to 10 p.m. and agreed with the AHP that the DEA would process the money.

At approximately 10:20 p.m. to 10:30 p.m., Deputy Prosecuting Attorney James C. Hale, Jr. ("Hale Jr.") arrived on the scene with his son, James C. Hale, III ("Hale III") (collectively referred to as "the Hales"), who handles the contract with Crittenden County to pursue state forfeiture actions. The Hales arranged for the funds to be kept in a Marion bank overnight. The Hales directed AHP on proper preservation and chain-of-custody concerns regarding the seized contraband. After giving these directions, the Hales left the scene and AHP transported the money and deposited it in the Marion bank that night. The following day, a Sunday, bank employees counted the money under the supervision of AHP. AHP also conducted "shake tests" on the money to determine if drugs were present on the money.

The procedural facts are somewhat complicated. On Monday, March 9, 1998, Hale Jr. filed a notice of seizure of forfeiture against Zamarripa, the truck driver, for an "uncontested" forfeiture proceeding in Crittenden County Circuit Court. At approximately the same time, AHP retrieved the money from the bank in Marion and transported it to Little Rock to place in AHP's vault. A dispute exists regarding whether Hale Jr. authorized the transportation and deposit of the funds in Little Rock. AHP contends that Hale Jr. authorized this action in anticipation of the DEA taking over the seizure action. The Hales contend that no such permission was given.

Sometime between March 10, 1998, and March 16, 1998, the DEA took physical custody of the money, completing its

paperwork confirming the initiation of DEA proceedings by March 16, 1998. During that time, Hale Jr. filed a second notice of seizure of forfeiture against the owner of the tractor-trailer rig, Omar Saenz, on March 11, 1998.

On March 18, 1998, the Crittenden County Circuit Court entered an *ex parte* order based on a motion filed by the Hales. At that time, no civil or criminal drug forfeiture case was pending in federal or state court, save for the notices of seizure of forfeiture filed against Zamarripa and Saenz in the Crittenden County Circuit Court. The *ex parte* order directed AHP to deposit the money in a bank to be wired to the Crittenden County Prosecuting Attorney's drug-asset account. The order also stated that the currency had been seized by AHP at the weigh station on March 8, 1998.

AHP filed a motion to vacate the order on March 20, 1998, contending that it was without notice, service, written motion, or verified pleading or affidavit as required by Ark. R. Civ. P. 65. The Hales, on behalf of the State of Arkansas, filed their complaint for forfeiture as a civil *in rem* action against the money, along with a notice of pending forfeiture on that same day. AHP and the United States were not joined as parties, nor did either intervene as parties to the civil *in rem* action. Thereafter, on March 20 and March 24, 1998, the circuit court entered agreed orders of forfeiture against Zamarripa and Saenz of which AHP had no knowledge.

AHP next filed on March 27, 1998, a motion to dismiss based on lack of jurisdiction, lack of service, lack of necessary parties, and pendency of another action or, in the alternative, an amended motion to vacate the March 18, 1998, *ex parte* order as that order relates to AHP. The circuit court denied AHP's motion to dismiss on May 8, 1998, finding that it had jurisdiction over the property and that AHP became a party when it filed motions and presented evidence. The circuit court ruled, however, that

AHP had no standing to challenge the order and that, despite its previous statement in the March 18, 1998, *ex parte* order, the Crittenden County Prosecuting Attorney, and not the AHP, was the "seizing law enforcement agent" that first seized the money. The circuit court also found that AHP no longer held the money and, therefore, could not comply with the court's March 18, 1998, *ex parte* order directing AHP to turn over the money to the Crittenden County Prosecuting Attorney. The circuit court failed to rule on AHP's motion to vacate. On May 18, 1998, AHP responded to the May 8, 1998, ruling with a motion to reconsider its motion to dismiss and motion to vacate which it claimed it filed pursuant to ARK. R. CIV. PR. 12, and asked for specific findings of fact and conclusions of law. AHP also filed its first notice of appeal from the previous orders issued by the circuit court.

On June 24, 1998, AHP filed a second notice of appeal including an appeal from the previous orders and from the denial of its motion to reconsider. The circuit court did not rule on the reconsideration request. Apparently in response, the circuit court entered a judgment on July 16, 1998, finding that AHP was not a party as previously stated in its May 8, 1998, and that AHP did not have standing to object to the circuit court proceedings. The circuit court did not rule on AHP's motions, but made findings of fact and conclusions of law regarding the proceedings in this matter. AHP filed a third notice of appeal on July 22, 1998, again appealing from the previous orders entered by the circuit court.

The United States filed a complaint of judicial forfeiture in the United States District Court for the Eastern District of Arkansas on July 27, 1998, in response to a submission of claim of ownership to the money filed by the Crittenden County Deputy Prosecutor on June 2, 1998. The complaint of judicial forfeiture is now pending as *United States v. $3,166,199*, No. 98 CV-509.

In addition to its appeal from the orders of the circuit court, AHP also filed a petition for writ of certiorari or, alternatively, for prohibition and/or mandamus to the Crittenden County Circuit Court and a request for temporary relief on August 5, 1998. These petitions were denied without prejudice by this Court on September 10, 1998. Shortly thereafter on September 23, 1998, the Arkansas Attorney General's office filed a motion to dismiss the appeal filed by AHP, arguing that AHP was not a party below and, therefore, has no standing to appeal.

Standing

The threshold issue for this appeal is Arkansas Highway Police's standing to object to the trial court's actions on appeal in that they were not a party to the proceedings below. The general rule regarding standing is that an appellate court cannot act upon an appeal taken by one not a party to the action below. *In the Matter of Allen*, 304 Ark. 222, 800 S.W.2d 715 (1990); *Arkansas Dep't of Human Svcs v. Bailey*, 318 Ark 374, 855 S.W.2d 677 (1994); *Quattlebaum and CBM, Inc. v. Gray*, 252 Ark. 610, 480 S.W.2d 339 (1972). Under our rules party status is generally obtained by initiating an action through filing a complaint or responding to a complaint by answer. It is also possible to become a party by intervention under Rule 24 or by joinder under Rule 19. In the instant case, none of these events is in evidence and therefore, ordinarily, AHP would not have standing to bring this appeal. However, we have recognized two other circumstances in which a nonparty may gain standing to pursue appellate review of a trial court's orders. The first occurs when a nonparty seeks relief under Rule 60(k), which provides that an independent action may be filed to relieve a person from judgment who was not actually served with process. *Arkansas Dep't of Human Services v. Bailey*, 318 Ark. 374, 885 S.W.2d 677 (1994). AHP has not sought such relief so it is inapplicable. The other circumstance is the unique set of facts where any appellant, though not a party, has a pecuniary interest affected by the court's disposition of the

matter below. In *Allen, supra*, this court noted that it has long recognized an exception to the general rule for one pecuniarily affected by a judgment. *Arkansas State Hwy. Comm'n v. Perrin*, 240 Ark. 302, 399 S.W.2d 287 (1996).

We disagree with the trial court's determination that the "seizing law enforcement agency" was the Crittenden County Prosecuting Attorney's Office. Clearly, the AHP was the seizing law enforcement agency as that term is used in Ark. Code Ann. § 5-64-505 (Repl. 1997). Though not specifically defined in the statute, it is apparent from the context that police rather than prosecutors are contemplated by the term. It is undisputed that AHP, for its role in the seizure, is entitled to some portion of the *res* pursuant to Ark. Code Ann. § 5-64-505(k)(2)(iii). The amount will be impacted by pending litigation in this court and in federal court. We hold, therefore, that AHP has a pecuniary interest affected by the court's action and therefore has standing to bring this appeal.

Statutory Construction

On the merits, the crucial issue before this court is the interpretation of our forfeiture statute, § 5-64-505. AHP'S first and most critical point on appeal concerns whether AHP's seizure of the *res* on the night of March 7, 1998, and subsequent DEA adoption resulted in a federal seizure or state seizure. AHP contends it resulted in a federal seizure, relying upon the Eighth Circuit federal cases of *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995) and *U.S. v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992). The appellee, on the other hand, contends that due to the "turnover" nature of our statute, a state seizure occurred and that the money remains under the jurisdiction of the circuit court. Appellees cite Seventh and Fifth Circuit cases for authority that the nature of the state statute is determinative. We agree with appellees and hold that our statute vests initial jurisdiction of the

res in the circuit court of the county where seized. Any subsequent transfer of the *res* requires a circuit court order.

In *Madewell*, the Missouri State Highway Police seized $9,400 in cash incident to an arrest for drug-related charges. The defendant sought return of the currency in state court but before the state court ruled Missouri State Highway Police's seizure was adopted by the DEA. The Missouri State Highway Police delivered the money in the form of two cashier's checks to the DEA without any order from the court. The claimant sued in federal district court seeking return of the money, but the court held adversely to him finding that a valid federal adoption occurred. Upon review, the Eighth Circuit held the adoption effective and that it had the same effect as if the federal agency had originally seized the property on the date the local authority seized it. *Id.* at 1039. The court determined that the Missouri law in effect at the time of the seizure did not require a court order before the property could be turned over to federal authority. The court did note that Missouri subsequently enacted a "turnover" statute with specific language vesting jurisdiction of the seized property in state court.

AHP also strongly relies on *$12,390.00*, which held that a voluntary transfer from state authorities to federal authorities before institution of state court proceedings allowed the federal agency to have control of the property for purposes of forfeiture. In *$12,390.00*, a federal agent adopted the seizure immediately with consent of the state authorities. *Id.* State court proceedings were filed by the claimant but subsequent to initiation of federal administrative forfeiture proceedings. This case, like *Madewell*, was decided in Missouri prior to enactment of a "turnover" statute.

Appellee responds to the above cases by citing Fifth and Seventh Circuit federal cases that it contends are more apposite to the instant facts because of relevant Arkansas law. The State cites *United States v. One 1979 Chevrolet C-20 Van*, 924 F.2d

120 (7th Cir. 1991). In that case, local authorities in Illinois seized a van incident to an investigation of suspected drunk driving. An inventory search of the van had revealed a significant quantity of marijuana under the driver's seat. Subsequently, the local authorities requested the Federal Bureau of Investigation to "adopt" the seizure which they did by initiating administrative forfeiture proceedings. Pursuant to applicable state law, the State of Illinois filed a complaint in state court for forfeiture of the van. Approximately one month later, the FBI filed a forfeiture action in federal district court. An Illinois federal district court upheld the adopted seizure by federal authorities but the Seventh Circuit Court of Appeals reversed. It stated, "A local police department may not take seized property and just pass it on as it pleases to the FBI in flagrant disregard of state laws mandating judicial authority for such turnovers." *Id*, at 122. The court followed its own precedent and invalidated the federal adoption where a state statute put control of the *res* in state court and state court proceedings had commenced prior to federal court proceedings. The court stated, "If the federal authorities wanted the van, they were bound to seek a turnover order from the circuit court of the county in which the van was seized." *Id.*, at 123. *United States v. $79,123.49 in U.S. Cash and Currency*, 830 F.2d 94 (7th Cir. 1987). The Fifth Circuit has also recognized that under a state "turnover" statute, it is the seizure by a state agency and not the institution of a formal proceeding which exclusively vests jurisdiction in the state court. *See Scarabin v. Drug Enforcement Administration*, 966 F.2d 989 (5th Cir. 1992).

Interestingly, the Illinois statute in *One 1979 Chevrolet C-20 Van* is almost identical to Arkansas' forfeiture provision found at Ark. Code Ann. § 5-64-505.[1] Our statute provides in pertinent part:

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[1] Il ST CH 56 1/2 ¶ 712(d)